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JAMES H. McKENNE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 1482. 1141.

WINFIELD S. GREGG,
Appellant,

versus

THE METROPOLITAN TRUST COMPANY, MERCANTILE TRUST COMPANY and JOSEPH ROBINSON, Receiver of the Columbus, Sandusky & Hocking Railroad Company et al,
Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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WINFIELD S. GREGG,

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vs.

METROPOLITAN TRUST COMPANY et al,

Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Supreme Court of the United States:

The appellant respectfully prays for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit, and annexes hereto a statement of the case and his grounds for petition. He files printed copies of the record in the Circuit Court of Appeals and a certified copy of the transcript of the proceedings in that court.

HARLAN CLEVELAND,
Of Counsel for the Petitioner.

STATEMENT OF THE CASE.

In a suit to foreclose a first and second mortgage on the Columbus, Sandusky & Hocking Railroad Company W. S. Gregg was an intervening petitioner to the amount of $6,804.49, for ties and other current supplies furnished the railroad for its maintenance and operation from day to day as a going concern (Record, 158, 160).

A receiver was appointed in the foreclosure suit on the 2d day of June, 1897, and most of the supplies referred to had been furnished in the month of May, 1897, and on the 1st, 2d and 3d days of June, 1897. When the receiver took his inventory on the 10th of June, 1897, $3,200.00 worth of these supplies were found to be on hand.

The claim was presented to and allowed by the Circuit Court as a *six months' supply claim* within the terms of the order originally appointing the receiver, but so far as it was sought to have the same declared a lien on the *corpus* of the property and paid out of the proceeds of the sale thereof it was disallowed; also, so far as it was sought to have the same declared a lien on the *corpus* of the property to the extent of $3,200.00 by reason of the supplies to that amount having been purchased at a time when the railroad company knew it was insolvent, and had no intention of paying therefor, which supplies had come into the hands of the receiver and had been used by him for the benefit of the property, it was likewise disallowed.

On appeal to the United States Circuit Court of Appeals (*Gregg* v. *Mercantile Trust Co. et al*, 109 Fed., 220), the decree was reversed upon a question as to whether or not there had been a diversion or restoration of current earnings.

The Circuit Court finding that there had been a diversion of earnings, but a restoration thereof sufficient to make good the diversion, again dismissed the claim so far as it was sought to have payment thereof from the *corpus*

of the property, or so far as the special equity was claimed, to the amount of $3,200.00.

The Circuit Court of Appeals affirmed this decree, and reiterated its prior decision, in which it had held—

"That preference could be given to such claims only out of the income of the mortgaged railroad, and that mortgages upon the *corpus* could only be displaced by such creditors when it was shown that there had been a diversion of the income either before or after the receivership by which the mortgagees had profited" (*Gregg* v. *Mercantile Trust Co.*, 109 F. R., 220, 227).

I.

The Circuit Court of Appeals for the Sixth Circuit, in so deciding, was in irreconcilable conflict with its prior decisions, and with the Circuit Courts of Appeals for the First, Fourth, Eighth and Ninth Circuits.

(1). It had first formulated the doctrine applicable to such claims in *Central Trust Co.* v. *East Tennessee, V. & G. R. Co.*, 80 Fed., 624, where it had said (page 626):

"But, independently of any diversion of current income, there is a class of debts, incurred in maintaining the operation of a railway, which, under special circumstances, and subject to very positive limitations, has been held to outrank, in priority of payment, contract liens."

And after discussing

Miltenberger v. *Railway Co.*, 106 U. S., 286–311;
Burnham v. *Bowen*, 111 U. S., 776–781;
Kneeland v. *Trust Co.*, 136 U. S., 89–97;
Thomas v. *Car Co.*, 149 U. S., 94–117,

had summarized the law as follows:

"From these cases it may be deduced that in respect of railroad mortgages there is an implied agreement that all proper operating expenses of such companies, while under control of the mortgagors, are to be paid out of current receipts, and that any diversion of such income by which

current operating expenses are left unpaid is a misappropriation of the income, and upon a proper showing the mortgagees receiving the benefit will be required to reimburse the fund applicable to the payment of these 'debts of the income' to the extent of the diversion. It may further be deduced that, *independently of any diversion*, the necessary operating expenses of a mortgaged railroad, constituting a first charge upon the income while under the control of the mortgagor, will continue to be a charge upon the income under a receivership, *and, if necessary, upon the corpus of the property.* This latter equity is supposed to arise from the nature of the public duties resting upon such companies, and upon the necessity of such expenditures in preserving the property as a going concern for the ultimate benefit of the mortgage creditors." [Italics ours].

Despite this decision, which was rendered in 1897, the same court, in 1899, while the case at bar was pending in that court, said, in *International Trust Co.* v. *Townsend Brick & Contr'g Co.*, 95 Fed., 850 (page 860) :

"The power of the court to displace mortgage liens in favor of such unsecured debts of the mortgagor *depends upon the fact that the current income, either before or after the receivership, has been diverted to the benefit of the displaced mortgage*, and the extent to which the *corpus* of the mortgaged property can be called upon to pay such debts of the income is limited by the amount of the diversion." [Italics ours].

In *Rhode Island Locomotive Works* v. *Continental Trust Co.*, 108 Fed., 5, 7, this general rule was again stated.

In both of these cases, however, the claims seeking priority were held not to be "current supply claims" or "debts of the income." The two decisions, at total variance with the prior case, were purely *obiter* in reference to the question whether the claims were payable out of the proceeds of the sale of the mortgaged property. For, in the first case, the bridge, for the payment of which priority was sought, was decided to be a permanent betterment; and in the second case, the locomotives, for which payment

was sought, were found to have been purchased on the general credit of the company, and not in the expectation of being paid for out of current earnings.

But on the first appeal of the case at bar (*Gregg* v. *Mercantile Trust Co.*, 109 Fed., 220), while the claim was found to be one for current operating expenses absolutely necessary to enable the railroad to continue as "a going concern," and "in every respect a highly meritorious one," the court followed its *dicta* in the last two cases, contrary to its prior decision in 1897, although it declared (page 229):

"We are aware of the fact that in maintaining the necessity for evidence of diversion of income before allowing solemn mortgage securities to be displaced we are in disagreement with other courts of appeal, for whose judgment we entertain very great respect. Believing, as we do, that we have correctly interpreted the opinions of the Supreme Court, and that the limitations which have been placed upon the preferential character of unsecured operating debts are in accord with settled principles of justice, we shall adhere to the views we entertain until the Supreme Court shall otherwise adjudicate."

(2). The circuit courts of appeals referred to in this statement are as follows:

First Circuit.—

In the Circuit Court of Appeals for the First Circuit, in the case of *New England R. R. Co.* v. *Carnegie Steel Co.*, 75 Fed., 54, Judge Putnam said, pages 58, 59:

"The petition sets out no special circumstances to distinguish the claim from an ordinary current supply bill, or to entitle it to a lien on the *corpus* of the mortgaged property. It states enough, in connection with what we have already explained, to entitle it to the usual order for payment by the receivers, and consequently by the purchasers referred to. Therefore, as it ranked only as an ordinary current supply bill, could the court give it priority over the mortgage in question on the *corpus* of that portion of the property as to which the corporation had absolutely parted with all power of disposal except subject to the

mortgagee's title? Whatever might be our decision if the case was of novel impression, we think we are concluded by *Miltenberger* v. *Railway Co.*, 106 U. S., 286, 292, 293, 295, 298, 302, 304, 308, 311, as explained, and perhaps limited, in *Kneeland* v. *Trust Co.*, 136 U. S., 89, 96, 97; *Thomas* v. *Car Co.*, 149 U. S., 95, 110, 112; *Bound* v. *Railway Co.*, 7 C. C. A., 322, 58 Fed., 473, 480, and *Finance Company of Pennsylvania* v. *Charleston, C. & C. R. Co*, 10 C. C. A., 323, 62 Fed., 205, 208. We are therefore required to hold that the circuit court had the power to give the priority complained of to supply bills of the character, contracted at the time and remaining unpaid, under the circumstances shown in reference to those now at issue. What would have been the conclusion if the trustees of the second mortgage had not asked for a receiver and had not submitted to the order of September 8, 1894, modifying to some extent the then existing receivership, and thus giving it retroactive effect as of the time of its original creation, we need not determine. So far as we have discovered, *Miltenberger* v. *Railway Co.* is the only instance in which the Supreme Court has in fact allowed accrued supply bills a priority against the *corpus* of mortgaged property; and, as we understand that suit, the circumstances of the case at bar in its final stages are substantially the same for our present purposes, and we have followed strictly its conclusions without going beyond them."

This case affirmed the lower court, which had held in *Wood* v. *New York & N. E. R. R. Co.*, 70 Fed., pp. 741, 743—

"that independently of the question of diversion, debts may be preferred which are incurred for labor and supplies necessary to keep the road a going concern from day to day, or which are the outcome of indispensable business relations, a continuance of which involves the interests of the public and the traffic of the road." [Italics ours].

Fourth Circuit.—

In the Circuit Court of Appeals for the Fourth Circuit, in the case of *Finance Co.* v. *Charleston, C. & C. R. Co.*, 62 Fed., 205—where it affirmatively appeared that the earnings of the railroad company were never sufficient to pay operating expenses—it had been held, speaking through Mr. Justice Fuller:

"It must be regarded as settled that a court of equity may make it a condition of the issue of an order for the appointment of a receiver of a railroad company that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver or from the proceeds of sale; that preferential payments may be directed of unpaid debts for operating expenses, accrued within ninety days, and of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, in view of the interests both of the property and the public, that the property may be preserved and disposed of as a going concern and the company's public duties discharged; and that *such indebtedness may be given priority, notwithstanding there may have been no diversion of income*, or that the order for payment was not made at the time and as a condition of the receiver's appointment, the necessity and propriety of making it depending upon the facts and circumstances of the particular case and the character of the claims (*Miltenberger* v. *Railroad Co.*, 106 U. S., 286, 311; *Trust Co.* v. *Souther*, 107 U. S., 591, 594; *Union Trust Co.* v. *Illinois M. Ry. Co.*, 117 U. S., 434; *Morgan's L. & T. Railroad & Steamship Co.* v. *Texas Cent. Ry. Co.*, 137 U. S., 171; *Kneeland* v. *Foundry Works*, 140 U. S., 592). Of course the discretion to enter such orders should be exercised with great care, but as late as *Thomas* v. *Car Co.*, 149 U. S., 95, 110, the Supreme Court quoted the remarks upon the doctrine and its proper application in *Miltenberger* v. *Railroad Co.*, *supra*, with approval, although, as observed by this court in *Bound* v. *Railway Co.*, 58 Fed., 473, 7 C. C. A., 322, the tendency of that case was to narrow the limits within which an equity court should confine itself in making such allowances." [Italics ours].

In the case at bar it was a provision of the order appointing the receiver, made at the instance of the trustee of the first mortgage, that the six months' claims be paid (Record, 24–25), and some of them were paid (Record, 30, 35).

Eighth Circuit—

In the Circuit Court of Appeals for the Eighth Circuit, in the case of *St. Louis Trust Co.* v. *Riley*, 70 Fed., 32, the court said (pages 36, 37):

"From this brief review of the decisions of the Supreme Court bearing upon this question, we think these propositions may properly be deduced:

"First. There are certain claims against a mortgaged railroad company, accruing before the appointment of a receiver, which are entitled to preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership and out of the proceeds of the sale of its property.

"Second. It is an indispensable element of every such claim that it is founded upon property furnished or services rendered to the mortgagor which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee.

"Third. Claims of this character have been given a preference over the mortgage debt by these decisions on one of two grounds—either on the ground that the mortgage is a lien on the net, and not on the gross, income of the railway company, and where that part of the income that is applicable to the payment of current expenses of operation, proper equipment and necessary improvements has been diverted to pay interest on the mortgage debt or to otherwise benefit the security, and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the earnings of the diverted fund by taking an equal amount from the railway company during the receivership and applying it to the payment of these claims in preference to the mortgage debt (*Fosdick* v. *Schall*, *Burnham* v. *Bowen*, *St. Louis, A. & T. H. R. Co.* v. *Cleveland, C., C. & I. Ry. Co.*, *Railroad Co.* v. *Hamilton*, *Morgan's L. & T. R. S. S. Co.* v. *Texas Cent. Ry. Co.*, *supra*); *or on the ground that the payment of the claims is necessary to preserve the mortgaged railroad, and to keep it a going concern.* It is indespensable that the operation of a railroad be uninterrupted in order that the travel and traffic of the public may be accommodated, and in order that the franchises of the railroad company may be preserved from forfeiture. Hence, the wages of employes, who might otherwise cease from their work; the amounts due to connecting lines of railroad that might otherwise cease their business relations with the managers of the mortgaged property, *and the claims for supplies and materials necessary to keep the mortgaged railroad a going concern, may, in proper cases, be paid out of the earnings during the receivership, or out of the*

proceeds of the sale of the mortgaged property, in preference to the mortgage debt." [Italics ours].

And in *Central Trust Co.* v. *Clark*, 81 Fed., 269, the same court said, in reference to this class of cases (page 271):

"It thus appears that within less than thirty days after the gear wheel and pinion had been delivered by the Midvale Steel Company and placed in operation, the railway company mortgaged the property so acquired, along with its other property, and used the proceeds of the mortgage to meet its interest obligations to the first and second mortgage bondholders. In view of these facts, we think, as before stated, that the intervenor's claim was of such a nature that a court of equity having in charge the administration of the fund realized by the sale of the mortgaged property was fully justified in according it a preference, and in directing its payment before any distribution of the proceeds of the sale was made among the mortgage bondholders. The circumstances under which the indebtedness in controversy was contracted were such as to bring the case fully within the doctrine which was stated by this court, after a full review of all the decisions, in *Trust Co.* v. *Riley*, 36 U. S. App., 100, 16 C. C. A., 610, and 70 Fed., 32, namely, that in a suit brought to foreclose a mortgage lien upon the property of a *quasi* public corporation, it is competent for a court of equity to award a preference to a claim for property supplied or services rendered to such corporation, when it appears that the property so supplied or the services rendered were necessary to enable the company to discharge its public obligations and remain a going concern, and when it is evident that the property or services in question enhanced the value of the mortgaged property, and thereby inured to the benefit of the mortgagees."

Ninth Circuit—

In the Circuit Court of Appeals for the Ninth Circuit, in the case of *New York Guaranty & Indem. Co.* v. *Tacoma Ry. & M. Co.*, 83 Fed., 365, the court said (pages 369, 370):

"The question here is not so much whether the cable involved in this claim for preference is to be regarded in

the light of repairs, or for construction, or as an improvement, or in the nature of materials or supplies furnished; but it depends upon the inquiry whether or not it was necessary to keep the road 'a going concern,' within the meaning of this expression as it is used by the Supreme Court in the cases cited above.

"It is further contended that the claim in question is in the nature of a claim for repairs and improvements, and that, to make out a case for preference, there must have been some diversion of income, which otherwise would have been applied, or was properly applicable, towards the payment of the claim, to payment of bonded interest, or otherwise to the benefit of the security (citing *Farmers Loan & Trust Co.* v. *Northern Pac. R. Co.*, 68 Fed., 36, 37). But, to use the language of Judge Caldwell, in *Farmers Loan & Trust Co.* v. *Kansas City, W. & N. W. R. Co.*, 53 Fed., 182–189:

"'And it is error to suppose that such debts can only be given priority where there has been a diversion of the income of the road. Nor is it true that they can only be paid out of the earnings of the road, and can not be made a charge on the *corpus* of the property. A diversion of the income is not essential to give them priority, and they may be made a charge on the *corpus* of the estate if the earnings are not sufficient to pay them (citing *Miltenberger* v. *Railway Co.*, 106 U. S., 286–311, 312; *Union Trust Co.* v. *Illinois M. Ry. Co.*, 117 U. S., 434–457; *Thomas* v. *Railway Co.*, 36 Fed., 808'").

II.

This court has in two cases distinctly recognized the same principle, namely, that a diversion of earnings is not a condition precedent to the payment of current operating expenses out of the *corpus* of the property.

Miltenberger v. *Logansport Railway Co.*, 106 U. S., 286.

This case was cited approvingly in *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S., 434. In that case wages due employes of the railroad within six months immediate-

ly preceding the appointment of the receiver were allowed priority out of the *corpus* of the property (see page 465).

It does not affirmatively appear whether there had been any diversion of earnings by the company in favor of the bondholders; but there is no allusion to that fact as necessary to the granting of a lien upon the *corpus* of the property, although there is a discussion of the diversion of a portion of the income of the receivership to "betterments" upon the property, which necessitated the issuance of receiver's certificates charged upon the *corpus* to make good this diversion of earnings, as the operating expenses of the receivership were greater in amount than the sum thus diverted, and a portion thereof remained unpaid (see pages 462–3). That there was no final diversion of earnings during the receivership is shown by charging a portion of the receiver's operating expenses upon the *corpus*, after the diversion for betterments had been provided for (see pages 464–5).

This court has never refused to pay supply claimants out of the *corpus*, on the ground that there has been no diversion of earnings; and has never formulated any such doctrine; nor have its decisions been construed as formulating any such doctrine except by the Circuit Court of Appeals for the Sixth Circuit. Four other courts of equal jurisdiction have interpreted its decisions as being quite the contrary.

The only cases in this court in which a charge against the *corpus* of the property has been denied are the following:

Fosdick v. *Schall*, 99 U. S., 235.
Huidekoper v. *Locomotive Works*, 99 U. S., 258.
Penn v. *Calhoun*, 121 U. S., 251.
St. Louis, etc., R. R. v. *Cleveland, etc., R. R.*, 125 U. S., 658.
Kneeland v. *Amer. Loan Co.*, 136 U. S., 89.
Morgan's Co. v. *Texas Central Ry.*, 137 U. S., 171.

Louisville, etc., Railroad Co. v. *Wilson*, 138 U. S., 501.
Thomas v. *Western Car Co.*, 149 U. S., 95.

None of these cases involved claims for supplies furnished or labor rendered to a railroad company necessary to maintain the railroad from day to day as a going concern.

Fosdick v. *Schall*, *Huidekoper* v. *Locomotive Works*, *Kneeland* v. *American Loan Co.* and *Thomas* v. *Western Car Co.* were all cases on leasing of rolling stock. The principle upon which all the rolling stock cases are decided is that the conditional vendor, having retained a lien upon particular property, is limited to the lien on that particular property, and if he recovers that property he is not in equity entitled to make an additional charge against the realty. If, on the other hand, the particular property is taken for the benefit of the realty, and sold with the realty, then the lien on the particular property having been absorbed in the general property, he is entitled, by way of subrogation, to payment from the proceeds of the whole property.

Penn v. *Calhoun* and *Morgan's Co.* v. *Texas, etc.*, were claims for money loaned to the railroad company. The lenders were rightly held to be unsecured creditors merely.

In *St. Louis, etc., R. R. Co.* v. *Cleveland, etc., R. R.*, the claim was for rent of a leased line. It is manifest that the operation of a leased line is not necessary to maintain as a going concern the main line of the lessee company.

Louisville R. R. Co. v. *Wilson* was a claim for attorney fees. Clearly attorneys' services are not indispensably necessary to enable a railroad to perform its public functions.

III.

All Six Months' Claimants are Entitled to the Same Treatment.

The original order appointing the receiver authorized him to borrow not exceeding $35,000 to pay claims against the company which accrued due within six months prior to his appointment (Record, 24). Subsequently on June 7, 1897, an order was made authorizing the receiver to borrow $200,000 for the same purpose (Record, 30). Of the $200,000 so authorized $35,000 were by the later order of July 7, 1897, specifically authorized to be used to repay the $35,000 previously borrowed under the original order of appointment, and which sum had been used to pay the pay-rolls of the company for April and May, the two months prior to the receivership (Record, 35). The remainder of the $200,000 was by order of July 7 diverted to permanent improvements (Record, 35).

The action thus taken by the court, if not taken by the actual consent of the trustees of the two mortgages, was at least so taken without their objection. They thus tacitly agreed thereto. The action of the court at the instance of the receiver in modifying the original authority to borrow money to pay supply claimants of the class of which Mr. Gregg forms a part, while leaving intact the power to borrow money to pay the pay-rolls of the company for the two months prior to the receivership, has resulted in the payment of the laborers and employes of the company for services rendered to it prior to the receivership from the proceeds of receiver's certificates which have been decreed by the court to be paid from the proceeds of the sale prior to the mortgage bondholders.

The claims of these laborers and employes for their wages for the services rendered to the company prior to the receivership have no superior equity to the claims of those furnishing supplies during the same time necessary

to maintain the railroad from day to day as a going concern. By the court's orders part of a class of creditors, all of whose claims stood upon an equal footing as to the lien of the mortgage bondholders, has been paid out of the *corpus* of the property, thus making their claims prior to the lien of the mortgage bondholders, while the other part of the same class have had their claims postponed and made junior to the same lien of the bondholders.

This should not be done. Equity requires that the supply claimants whose claims have been thus postponed by the court should be put upon an equal footing with the claims of the laborers who have been paid.

As was said by Judge Putnam in *New England R. Co.* v. *Carnegie Steel Co.*, 75 F. R., 54, on page 57:

> "It appears that, pursuant to the decree, many claims of the class of the petitioner's were paid by the receivers. Indeed, so far as the record goes, this is the only one unpaid. This would not be equity if the petitioner should ultimately fail of recovery, as equity demands equal distribution among all of the same class."

Even if the claims of those furnishing supplies to a railroad immediately before a receivership are not, for the reasons heretofore stated, entitled to a lien upon the *corpus* of the property prior to that of the mortgage bondholders, in this case the action of the court in ordering, as an incident to the appointment of a receiver, the claims to be paid, and in paying a part of the claims of a class only equal in lien and equity to those of Gregg and the other supply claimants remaining unpaid, all of which was done at least with the tacit assent of the trustees of the mortgages, now entitles these postponed claimants to be paid from the *corpus* of the property, thus putting all of the same class of creditors upon an equality.

The original orders appointing the receiver, and directing these claims to be paid, and authorizing him to

borrow funds sufficient for that purpose, were made either at the instance of the trustee of the first mortgage, and on its application for a receiver, or on the application of the receiver himself.

As said by the Supreme Court in *Fosdick* v. *Schall*, 99 U. S., 235–253:

"The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors he need grant none; but if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mold his order that, while favoring one, injustice is not done to another. If this can not be accomplished the application should ordinarily be denied."

While this doctrine was abused to such an extent as to call forth a sharp reprimand from this court in *Kneeland* v. *the American Loan Co.*, 136 U. S., 89–97, still it must within proper limits be treated as the equitable rule. If, as in the Miltenberger case, 106 U. S., 286, claims of the character of the one at bar were paid out of the *corpus* against the objection of the first mortgagee, it is not asking too much that the original order of the court made at the instance of the first mortgagee should be carried out. Even had the orders not been originally made directing the payment of the claims at bar, still the court might have subsequently provided for their payment.

Fosdick v. *Schall*, 99 U. S., 235–253.
Carnegie Steel Co. v. *N. E. R. R. Co.*, 79 Fed., 741.
Finance Co. v. *the C. & C. R. Co.*, 62 Fed., 205.

A fortiorari, should such an order which has been partly carried out, have been enforced by the court below as to all claimants of the same class.

IV.

The Special Equity for $3,200.

The receiver was appointed June 2, 1897.

The stipulation between the parties shows that during the month of May and on the 1st, 2d and 3d days of June, 1897, there were sold and delivered to the C., S. & H. R. R. Co. ties of the value of $4,709.53, payment for which would have been due on the 25th of June, 1897, and that an inventory taken by the receiver on the 10th of June, 1897, showed that of the ties so sold and delivered there were on hand upon said date ties to the amount and value of $3,200, which said receiver thereafter used in the operation and maintenance of said railroad as a going concern (Record, 158).

Upon these facts the appellant, in any view of this case, is entitled to be paid out of the proceeds of the sale prior to the mortgage bondholders the sum of $3,200, being the value of the ties on hand when the receiver made his inventory, which were sold and delivered a few weeks before and on the day preceding and following the appointment of the receiver, which the receiver used and which thus inured to the benefit of the bondholders.

The ground of this contention is that the purchase of said ties by said railroad company at a time when it was, as it knew, hopelessly insolvent and had no reasonable expectation of paying therefor, and after it had defaulted on the interest due upon its bonds was a fraudulent purchase which would have entitled Gregg, had the ties not been in the possession of the court, to have retaken them, and which would have entitled and justified the court to order their re-delivery to him, or in default thereof, payment therefor.

While Mr. Gregg in this case could not, without the permission of the court, have taken the ties from the pos-

session of the court, he, in his intervening petition, called attention to the fact that a large part of the ties had been used by the receiver, after his appointment, in the operation and maintenance of the road. A special equity under the circumstances entirely apart from any question of diversion arose as to these $3,200 worth of ties. A court of equity should reimburse him therefor under the circumstances.

This court has recognized special equities entirely apart from any question of diversion.

St. L., etc., R. R. v. *Cleveland, etc., Ry.*, 125 U. S., 658, 673.
Union Trust Co. v. *Souther*, 107 U. S., 598.
Morgan v. *T. C. R. Co.*, 137 U. S., 171, 197.

V.

The record also presents an important question on the subject of diversion and restoration, and of what constitutes a restoration (See transcript of record, Circuit Court of Appeals, pp. 9–11).

We respectfully submit that in view of the far-reaching importance of the questions decided by the Circuit Court of Appeals, its conflict with courts of equal jurisdiction, and the necessity of this court authoritatively determining the law, the case is one which justifies the award of a writ of *certiorari* to bring the question before this tribunal for adjudication.

HARLAN CLEVELAND,
Of Counsel for the Petitioner.